

The Shortcomings of Family Mediation and Restorative Justice Proceedings

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This paper aims to examine the range and validity of critiques in family mediation and restorative justice proceedings. Written as part of an undergraduate module on Alternative Dispute Resolution (ADR), it addresses several criticisms that ADR has faced alongside its growing prominence in recent years. Using family mediation and restorative justice as the means by which to contextualise these criticisms, the article explores three major critiques: a lack of impartiality, power imbalances, and finally, informality that leads to injustice and uncertainty. Each analysis is explored discreetly, as well as in the two chosen mediatory contexts, and subsequently evaluated and compared with the adversarial system. The article arrives at the conclusion that each critique is intrinsically linked to the next, and, moreover, many of the advantages of family mediation and restorative justice also contribute to the perceived disadvantages. The paper strives to demonstrate that choosing to undertake a specific form of ADR is dependent on the individual's sense of personal justice and how they are looking to attain it.

Introduction

Modern Alternative Dispute Resolution ('ADR') processes largely comprise of arbitration, collaboration, negotiation, conciliation, and mediation. These subspecies of the larger ADR genus have obtained global recognition in recent decades, with growing prominence in both legal practice and academia.

The reasons behind the growth of ADR are several. Factors such as the increased delay and expense in the adversarial system following legal reform, as well as worldwide Access to Justice movements have significantly contributed. In some cases, a resistance towards courts and their perceived generalist solutions has also developed.¹ This increasing prevalence of ADR has been met with tremendous support in some instances, though it has also engendered a plethora of criticisms. This article addresses criticisms of mediation in particular, which is defined by Folberg and Taylor as:

A process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual settlements that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibilities for making decisions that affect their lives.²

¹ Simon Roberts and Michael Palmer, *Dispute Processes, ADR and the Primary Forms of Decision-Making* (2nd edn, CUP 2005).

² Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (John Wiley & Sons 1984) 7.

Family mediation and restorative justice are subsequently explored as the examples through which to evaluate the validity of certain critiques - namely, a lack of impartiality, imbalances of power, and uncertainty due to the informality of the process.

Family Mediation

Mediation in family law contrasts greatly with the proceedings found within a court of law, but operates within similar constraints, including but not limited to the 'paramountcy principle' of child welfare.³ The ideal of disputing parties attempting to 'solve things for themselves if they can'⁴ has resulted in a move towards facilitating out-of-court settlement procedures in recent years.

Mandatory mediation has largely been effectuated through the Legal Aid, Sentencing and Punishment of Offenders Act ('LASPO') 2012 and the restrictions on acquiring legal aid prescribed therein. The Children and Families Act 2014 further supplements LASPO by requiring applicants in family cases to attend a Mediation Information & Assessment Meeting ('MIAM'), aimed at helping disputants understand the nature of their conflict, thereby determining whether mediation is the appropriate course of action.

Restorative Justice

The term 'restorative justice' is utilised predominantly within the area of criminal law. There is no consensus as to its exact definition. For the purpose of this article, the following definition will be assumed:

[Restorative justice] encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.⁵

It becomes evident from this explanation, and other variations,⁶ that the focal points of restorative justice are twofold: the first being the achievement of some form of reparation for the victim; and the second, the encouragement of the offender to take responsibility for their actions so as to invoke a change in attitude that will prevent the individual from re-offending. Moreover, the rise of restorative justice, and the concept of reparation rather than retribution, is indicative of a shift in conventional understandings of fairness.⁷

³ Children Act 1989, s 1.

⁴ Ministry of Justice, *Family Justice Review* (Department of Education and the Welsh Government) para 104.

⁵ Restorative Justice Consortium, 'The Positive Effect of Restorative Justice on Re-Offending' (*Restorative Justice Council*, January 2006) <www.restorativejustice.org.uk> accessed on 25 December 2016.

⁶ Gordon Bazemore and Lode Walgrave, *Restorative Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice* (Criminal Justice Press, 1999).

⁷ Lode Walgrave, *Restorative Justice and the Law* (Willan 2002) ch 10.

Restorative justice can encompass a broad range of ADR procedures. These can be broadly split into direct and indirect victim-offender mediations, as well as community conferences,⁸ all of which fall under Folberg and Taylor's definition of mediation.

A Lack of Impartiality

The concept of impartiality is multifaceted. A mediator is expected to operate without prejudice, which is defined in psychological terms as 'an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group'.⁹ It becomes the mediator's duty to ensure their preconceived notions about the disputant parties, or indeed their case, do not have any bearing on the proceedings or outcome of the mediation. A failure in this capacity is frequently used to denounce mediation.

An argument in favour of the adversarial system arises here. Within a court of law, there exist constraints and regulations that bind the judge, limiting subjective input and thereby facilitating impartiality. Delgado *et al.* note:

Many judges are appointed for lengthy terms, in some cases for life, and are to that extent freed from having to be politically responsive in their decisions. Moreover, when a judge is appointed he or she agrees to apply an existing system of rules. The simple act of applying rules reduces bias.¹⁰

Similarly, the appointment of jurors is restrained. In the United States, for example, the doctrine of *voir dire* allows for the parties, their counsel, and the judge to remove jurors on the basis of prejudice, an infinite number of times.¹¹ The confidentiality necessary in mediation makes a similar process for vetting a mediator extremely difficult. Social psychologists suggest that once a prejudiced person realises that their views differ from the surrounding norms, they are likely to change their behaviour to conform.¹² The adversarial system can therefore be said to encourage the formation of a 'public conscience and a standard for expected behaviour that check overt signs of prejudice'.¹³ By contrast, the significantly more private setting of mediation does not provide an avenue for these checks to be undertaken.

There are ways that a mediator may seek to mitigate biases that arise. Bush puts forth a compelling argument in favour of what he coins 'active impartiality',¹⁴ stating mediators should direct actions and interactions toward both parties equally, and express to parties the importance of consistent behaviour.¹⁵ This makes it easier to attain and retain the trust of the disputants, and by consequence, explore a wider range of mediatory techniques. This is especially true if being fully impartial is not compatible with the context in which mediation is utilised.

⁸ Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley 2007) 25.

⁹ Gordon W Allport, *The Nature of Prejudice* (25th edn, Addison-Wesley 1979) 7.

¹⁰ Richard Delgado, Chris Dunn, Pamela Brown and Helena Lee, 'Formality and Fairness: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] *Wis L Rev* 1369.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Allport (n 10), 470-471.

¹⁴ Robert A Baruch Bush, 'Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation' [1989] 41 *Fla L Rev* 253.

¹⁵ *Ibid.*

The following two sections evaluate the validity of a lack of impartiality as a critique within the areas of family mediation and restorative justice.

I. In Family Mediation

Impartiality has been recognised by Marion Stevenson, a leading mediator, as one of three key guiding principles that a family mediator must consider.¹⁶ However, it can be said that 'pure' impartiality is a virtually impossible feat to achieve within the context of family law. For a mediator in this area to gain an accurate representation of events, an element of connection with the disputants is required and this cannot be achieved without some exposure to each party's narrative.¹⁷ As such, Bush's aforementioned solution of active impartiality could effectively reduce biases without sacrificing the personal interaction that is characteristically necessary in family mediation.

Even if the mediator does not impose his or her views directly, indirect suggestions may bear some influence. Furthermore, summaries of disputants' dialogue are written from the subjective perspective of the mediator. Through language selection, or in the case of omissions, a lack thereof, such documents become reflections of what the mediator assumes to be relevant, and may not accurately portray the nuances of communication between the parties.¹⁸

In cases concerning children in particular, the subjective nature of mediation in the context of family law may mitigate what appears to be a legislative bias in favour of mothers. This is especially true in cases concerning parental responsibility and the associated court orders, as only mothers and their husbands are given automatic legal parental responsibility.¹⁹ Further steps must be taken should an unmarried father of a child, for example, wish to acquire parental responsibility. Mediation before litigation may thus allow these fathers to reach a private agreement - a 'parental responsibility agreement'²⁰ - which confers rights to the father without court involvement, thereby reducing the need for costly court proceedings. This also makes legislation including the Children & Families Act 2014, which codified a presumption of parental involvement in a child's life, more enforceable by way of private ordering. Moreover, as aforementioned, family mediation must also operate bearing in mind the welfare of any children involved in the matter. Thus, inter-party bias aside, a mediator will commence proceedings with a heightened interest in the child's needs, and disputing parents may therefore be placed in a relatively unfavourable position. Hence, although partiality within family mediation is to an extent, inevitable, it cannot be said that courts and the law act without their own preconceptions.

II. In Restorative Justice

The impartiality critique progresses further within the context of restorative justice. Firstly, there arises the issue of differing definitions of impartiality, and discrepancies across restorative justice, *exempli gratia* within Youth Offending Teams. Rosenblatt states the following:

¹⁶ Marion Stevenson, 'Mediation: a distinctive approach to problem-solving' [2013] 43 Fam Law 98.

¹⁷ B Wilson, 'Emotion, Rationality and Decision-making in Mediation' [2004] 34 Family Law Journal 682.

¹⁸ Christine Piper, 'Norms and Negotiation in Mediation and Divorce' in Michael Freeman (ed), *Divorce: Where Next?* (Dartmouth 1996).

¹⁹ Children Act 1989, s 4.

²⁰ Jonathan Herring, *Family Law* (7th edn, Pearson 2015) 375.

The impartiality set out in international legislation on restorative justice and adhered to by restoravists is not the impartiality of community representatives, but the impartiality of mediators ... or facilitators.²¹

This highlights another key issue: who should take on the role of mediator in restorative justice proceedings? Standards of restorative practice such as the guidelines provided by the Youth Justice Board in England and Wales stress the requirement of impartiality.²² Whilst critics of family mediation suggest that a mediator *cannot* be fully impartial, a strong argument regarding restorative justice goes against aforementioned standards, proposing that a mediator *should not* be. Essentially, the idea behind this is that if the goal is rehabilitating the offender, and restoring order to the community, an understanding of the associated societal norms is vital. By this logic, a community representative, rather than a trained objective mediator would be the obvious choice.

Developments in South Africa are a prime example of evidence in favour of this view. The Truth & Reconciliation Commission was established in 1995²³ to restore a nation quite literally divided by the Apartheid regime. This article does not delve into the intricacies of the Commission, but rather notes that a key critique it faced was related to the objective approach it employed. Impartiality was paramount when selecting commissioners²⁴, and thus, deciding offenders' punishments was seen as a top-down approach by some academics, rather than that of a community seeking to restore justice.²⁵ This concern has been accommodated in subsequent South African restorative justice proceedings, including the Zwelethemba model, a hybrid of restorative and transformative procedure with a focus on the future rather than the past.²⁶ Pali and Pelikan note:

... the model resists the idea of a solution being crafted by an impartial out-sider. The authority for sorting things out in this model is not an outside authority, who impartially decides what is right and what should be done. Rather, the model insists that resolution comes from inside the community and that it arises as a consequence of deliberation. This is very different from other models in general, where impartiality and neutrality are heavily emphasised.²⁷

The success of the Zwelethemba model, in spite of rejecting outsider contributions, suggests that impartiality is not a prerequisite for the success of mediation, particularly within restorative justice. This, in turn, decreases the validity of impartiality as a critique of ADR.

Power Imbalances

²¹ Fernanda Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (Routledge 2015).

²² Youth Justice Board for England and Wales, 'Good Practice Guidelines for Restorative Work with Victims and Young Offenders' [2001] (*Restorative Justice*, 2001) <http://restorativejustice.org> accessed 25 December 2016.

²³ The Promotion of National Unity and Reconciliation Act 1995 (SA).

²⁴ *Ibid* s 7(2)(b).

²⁵ Catherine Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa' [2000] 16 SAJHR 415, 478-481.

²⁶ Brunilda Pali and Christa Pelikan, 'Con-texting restorative justice and abolitionism: exploring the potential and limits of restorative justice as an alternative', RJ [2014] 142, 151.

²⁷ *Ibid* 152.

Outcomes of all party-versus-party exchanges 'will reflect to some extent the bargaining endowments of different parties.'²⁸ In his seminal article 'Against Settlement', Owen Fiss criticises ADR for enhancing these power inequalities.²⁹

Fiss proposes a situation in which the structure and relatively informal nature of mediation can indirectly coerce a poorer party to accept a lesser settlement than they could otherwise obtain. Where there is an obvious disparity in power, an indigent party can be disadvantaged in terms of acquiring a range of necessary resources. They may be able to afford less, or no, legal advisement. This could prevent them from amassing and evaluating relevant legal information. In this instance, the impoverished party will find themselves disadvantaged during the bargaining stages of mediation.³⁰ Fear of no longer being able to fund the mediation may cause poorer disputants to agree hastily, potentially accepting unfavourable terms. Additionally, an urgent need for the money from settlement may drive them to prematurely reach an agreement to collect damages faster. Even in the absence of an economic disparity, power imbalances may arise due to the relative ability of each party to effectively communicate their needs.³¹

Mediators may attempt to offset power imbalances or reduce the effect they have on mediation proceedings. There is little accord as to how this should be done,³² particularly bearing in mind the principle of neutrality in mediation. Fiss believes taking institutionally-initiated mitigation steps is futile.³³ At face value, it appears this view has some merit. This is especially true when considering the presence of a judge, who may be able to supplement presentations put forth by parties and their counsel. Thus, in many courtroom cases, a lawyer-client relationship can minimise power discrepancies as the solicitor or barrister act and speak for the party they represent.

However, Fiss fails to account for the inequality of power that may arise through other means. Firstly, power dynamics may be in flux between a client and their counsel as a result of the lawyer's ability to relay information in a manner that is comprehensible to the client.³⁴ Additionally, whilst the direct disputant-versus-disputant imbalance may be reduced in courts, it has the potential to be replaced by an imbalance of power between the parties' representatives based on their respective levels of experience, their knowledge of the judge and other factors.³⁵ It can therefore be argued that adjudication does not remove power imbalances, but merely transfers them.

The upcoming sections examine the extents to which this is true within family law and restorative justice, as well as addressing any other context-specific discrepancies in bargaining force.

I. In Family Mediation

²⁸ Roberts and Palmer (n 2) 200.

²⁹ Owen M Fiss, 'Against Settlement' [1984] 93 YLJ 1073.

³⁰ Ibid.

³¹ Fiona Myers and Fran Wasoff, 'Meeting in the Middle' [2000] 33 SLT 259.

³² Roberts and Palmer (n 2) 200.

³³ Fiss (n 30).

³⁴ Myers and Wasoff (n 32).

³⁵ Ibid.

Power imbalances are prevalent throughout family conflicts, fuelled by 'differences in income, social background and personal stamina that tend to be covered up rather than overcome.'³⁶ Furthermore, within family disputes, parties are generally well-known to one another. Thus, one party opting to capitalise on what or who they know can disadvantage the opposing party during negotiations.

Herring notes the example of a divorce mediation where 'one party is a trained accountant and the other party has an aversion to figures'.³⁷ If these parties were to then discuss the division of household finances, the parties' prior experiences could contribute to a power imbalance. As previously mentioned, negotiation capabilities serve useful in meeting one's needs. If one party is aware of the other's reservations in this area, this can be used to their advantage.³⁸

It has been suggested that, in spite of the different forms in which power inequalities manifest themselves, the trend is that women are the disadvantaged party.³⁹ A key example is households where domestic violence has been present, where women are often the abused party.⁴⁰ The abuse itself may not bar mediation, however, several factors surrounding it may be taken into account when determining whether mediation is the appropriate course of action. In spite of organisational steps taken to offset a power imbalance of this nature, many parties do not disclose abuse they have endured, nor do they feel they were adequately protected throughout mediations.⁴¹ This undermines the efficacy and reliability of mediation as a means of reaching a mutually desired result.

Some argue that women have been societally conditioned to feel less comfortable with conflict than men, and therefore reach agreement sooner so as to avoid further conflict. Additional psychological arguments include the higher susceptibility of women to depression following the breakdown of a relationship, which arguably, may reduce their ability or willingness to negotiate, thus resulting in a power disparity.⁴² These arguments, however, are likely prone to both geographical and temporal variation, and cannot be accepted as fact. Further surveys have suggested that women prioritise the needs of others, including their former partner's and children's, over their own during family mediations and are more easily influenced by normative values.⁴³ This, to an extent, is in accordance with the feminist critique proposed by Grillo, who is of the view that ADR systems do not fix damage done in the past but merely ignore them and move onwards, incorrectly assuming an even power distribution along the way and ultimately worsening the divide. She states that:

... forcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real

³⁶ Wolfgang Voegeli, 'Alternative dispute resolution in divorce conflicts' [1992] 11 CJQ 283.

³⁷ Herring (n 21) 56.

³⁸ Myers and Wasoff (n 32).

³⁹ Ibid.

⁴⁰ Living Without Abuse, 'Understanding Abuse: Statistics' (*Living Without Abuse*, 2016) <www.lwa.org.uk/understanding-abuse/statistics> accessed 23 December 2016.

⁴¹ Myers and Wasoff (n 32).

⁴² Penelope E Bryan, 'Killing Us Softly: Divorce mediation and the politics of power' [1992] 40 Buff L Rev 441.

⁴³ Susan Tilley, 'Recognising Gender Differences in all Issues Mediation' [2007] 37 Fam Law 352.

experience of women in the service of someone else's idea of what will be good for them, good for their children, or good for the system.⁴⁴

However, English and Welsh law makes MIAMs mandatory, but does not impose an obligation on parties to solve their disputes via mediation. This critique is likely invalid with regards to voluntary mediations, although levels of coercion are not easily quantified. Indeed, research does not suggest that women felt particularly disadvantaged by family mediation proceedings,⁴⁵ and as such, it is debatable whether a male-female power imbalance exists in this area.

Family mediation creates an environment in which certain imbalances of power can be exacerbated by the intimate relationship parties may have or used to have, supporting the idea that power imbalances undermine the efficacy of mediation as a means of dispute resolution. Moreover, the idea that this gives rise to further criticism such as that proposed by Grillo is more unlikely, as the elective nature of mediation cannot be said to force parties - female or male - to participate.

II. In Restorative Justice

Perhaps the largest concern with regard to power imbalances in restorative justice is the perpetuation of the victim-offender dynamic. Exposing the affected person to the wrongdoer could prove traumatic for the former, and amplify a pre-existing discrepancy in personal power.

In cases of violent crime, a mediator lacks the ability to alter past events and subsequently, the fact that one party has more power than the other as a result of the trauma inflicted, becomes unchangeable.⁴⁶ Mitigatory and assessment measures⁴⁷ may prove effective when forging ahead with restorative justice mediations, but in practice, they fail to minimise existing power imbalances created through the harm inflicted by the offender.

This risk of reminding victims of previous harm makes Grillo's feminist critique⁴⁸ particularly relevant, that restorative justice proceedings arguably force normative values of restoration and acceptance on the female victims of violent or sexual crime. This is especially true when considering mandatory restorative justice proceedings; however, as with family law, it is unlikely to still be the case when the victim herself has opted to participate in restorative justice. More generally, using the Truth & Reconciliation Commission of South Africa as an example, restorative justice proceedings can potentially exploit a victim's suffering in order to turn a case into a public example.⁴⁹ This exploitation in both large and individual-scale restorative procedures could in fact

⁴⁴ Trina Grillo, 'The Mediation Alternative Process Dangers for Women' [1991] 100 YLJ 1545.

⁴⁵ Joan B Kelly and Mary A Duryee, 'Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings' [1995] 30 Fam Concil Courts Rev 34.

⁴⁶ Tilley (n 44).

⁴⁷ Myers and Wasoff (n 32).

⁴⁸ Grillo (n 45).

⁴⁹ Brittany Finder, 'Criticisms of the Truth & Reconciliation Commission of South Africa' (*Mount Holyoke*, 2009) <<https://www.mtholyoke.edu/~finde20b/classweb/Templates/criticisms.html>> accessed 7 January 2017.

increase power imbalances before seeking to improve them, and 'a victim may come out of the restorative process feeling more harmed.'⁵⁰

Informality Leading to Uncertainty and Injustice

The confidential nature of mediation denies disputants knowledge of how issues similar to theirs have been resolved previously. This contrasts starkly with the doctrine of *stare decisis* and the importance given to precedent in common law countries. Silver argues that mediation results in no lasting social impact as too much focus is given to the individual rather than the community at large.⁵¹ Furthermore, the relative informality of mediation proceedings often leads to accusations that it lacks the systematised checks and balances associated with adversarial system.⁵²

It is, however, frequently argued that the defining principle of mediation is to ensure that parties find a solution to their *personal* issue, rendering the outcomes of previous similar disputes irrelevant.⁵³ Moreover, mediators often employ an element of 'reality testing', which often has rooting in social norms. The symbiotic relationship of the law and societal conventions becomes relevant here, as the reality-testing utilised in mediations is likely influenced by the law to a certain degree and cannot be said to be completely devoid of it.⁵⁴ As De Sousa Santos points out, applying 'the law' may not even be necessary; in cultures where ADR is more prevalent than an adversarial system, local authorities rely solely on normative values to maintain order.⁵⁵

Nader posits that 'disputing without the force of the law is a lost battle.'⁵⁶ Whether this is applicable within the contexts of family mediation and restorative justice is addressed in subsequent sections.

I. In Family Mediation

Mediation's focus on individual, subjective justice can be viewed positively in family law. This *ad hoc* approach is more conducive to achieving the disputants' goals whilst also upholding legal standards, as mediation is more accommodating of the unique situation of families than the characteristically top-down nature of a court of law. The House of Lords has stated that many family cases will have several appropriate solutions and there is no strictly correct or incorrect answer.⁵⁷ Mediation thus facilitates exploration of these options. Indeed, if there is no right or wrong decision to be made, then the layman is just as qualified to reach it as a court, meaning that informality is of no consequence to the outcome of the case.⁵⁸ The appropriateness of state

⁵⁰ Katherine Doolin, 'But what does it mean? Seeking definitional clarity in restorative justice' [2007] J. Crim. L. 1.

⁵¹ Marjorie A Silver, 'The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement' [1987] 55 George Washington Law Review 482.

⁵² Gay Clarke and Iyla Davies, 'ADR — Argument for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' [1991] 7 QUT Law Review 81-95.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Boaventura De Sousa Santos, 'Law and Community: Nature of State Power in Late Capitalism' [1980] 8 Int. J. Soc. L. 37.

⁵⁶ Laura Nader, 'Disputing Without the Force of the Law' [1979] 88 YLJ 998.

⁵⁷ *Piglowska v Piglowski* [1999] 2 FLR 763.

⁵⁸ Herring (n 21) 52.

involvement in a private family dispute should also be considered. A court decision may strive to protect the interests of the state or a third party, and prioritise these interests over those of the disputants.

Criticisms arise over the paramountcy principle of child welfare, particularly with regard to divorce mediations. Although there is no distinct authority to ensure children are protected in mediation, judicial interpretation of legislation may also vary. Thus, it must be shown that a judge will understand a child's needs better than the child's parents in order to validate the idea that courts safeguard children more adequately than ADR.⁵⁹ The appropriateness of adjudication can also be questioned in cases concerning domestic violence. Here, solicitors may often use traumatic, personal accounts as a 'trigger to action'⁶⁰ in an effort to antagonise the opposition or further the court's agenda. Mediation provides a more intimate environment with minimal external intervention and the promise of confidentiality, thereby limiting privacy violations.

Another major issue is the varying understanding of 'justice' between mediators and solicitors. Wasoff and Myers studied solicitors' and mediators' divorce practices, and note that family courts and lawyers are more results-driven than process-driven, stating that 'for solicitors, the law and the interpretation of the law by the courts was their *lingua franca* of negotiations.'⁶¹ Contrastingly, mediators extended notions of fairness to include the parties' treatment of one another, as well as the cultivation of a respectful environment, rather than simply the arrival at a positive outcome. To state that the informality of mediation acted to the detriment of disputants would therefore be an unfair assessment as the processes are entirely different. Such an evaluation would depend on the individual preferences and respective endgames of the parties. Satisfaction with post-mediation outcomes is considered by some scholars to be just enough, whilst others denounce mediation's lack of legislative grounding in considering its ability to uphold justice and the rule of law.⁶²

Although there exists a 'tension for mediators between a [...] non-legalistic philosophy and the need to work within the law,'⁶³ family mediations often utilise law and legal norms as benchmarks around which to structure informal proceedings. Similarly, law works as a normative and moral authority for solicitors as well. Thus, ADR processes may invoke the courts. Strategic invocation can be used as a persuasive tool, although frequently, court proceedings can signify a mediator's loss of control over the parties and create avertable conflict. This contradicts the idea of a subjective fairness for the disputants rather than an objective overarching fairness, leading to less situational certainty for the disputants. Mnookin supports this viewpoint by stating that family mediation, specifically divorce, operates 'in the shadow of the law'⁶⁴. This is because elements of the adversarial system found within divorce mediation, as well as the looming possibility of invoking court proceedings in the event of a failure of 'private ordering'.

Furthermore, Nader's view can, within the context of family law, be refuted. The concepts of uncertainty and fairness are very much dependent on what disputants are seeking to achieve

⁵⁹ Ibid.

⁶⁰ Myers and Wasoff (n 32).

⁶¹ Ibid.

⁶² Clarke and Davies (n 53).

⁶³ Myers and Wasoff (n 32).

⁶⁴ Robert Mnookin & Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' [1979] 88 YLJ 950 – 997.

through their chosen course of action. The view that ADR's relative informality contributes to uncertainty can be viewed as over-simplistic. Whilst mediation lacks the rigidity provided by *stare decisis*, this, to some disputants, is the appeal of an adaptable and confidential form of dispute resolution. The option to choose between the two systems signifies an element of flexibility that can work in the favour of parties achieving their goals, whilst using the law as a benchmark in mediation allows for a rooting in socio-legal familial norms.

II. In Restorative Justice

The flexibility of restorative justice has undoubtedly contributed to its use in a variety of settings ranging from educational discipline to criminal law. Within the latter, an informal atmosphere allows both victim and offender to communicate freely in a safe space. However, this move away from the public nature of occidental criminal courts in favour of private proceedings detracts from principles of even-handedness, especially with regard to offenders. Without the doctrine of precedent, there is no means by which to ensure all offenders receive similar treatment for committing similar crimes.⁶⁵ Having said this, as mentioned, restorative justice focuses on recognition and reparation for the victim and the accountability of the offender. This idea of the offender taking responsibility for his or her wrongdoing, and making amends, is generally accepted as 'an essential element of complete justice,'⁶⁶ and thus, it can be argued that restorative justice allows for the public perception of justice to be complied with even if it does not necessarily coincide with legislative agendas.

Tied to the concepts of fairness and justice is the notion of punishment. Restorative justice is more rehabilitative than retributive. Thus, a common criticism is that offenders are treated 'softly'.⁶⁷ Giving a voice to offenders as part of preventative steps against re-offending can often give rise to the misconception that restorative systems are extremely lenient relative to adversarial ones. In spite of this, the adversarial system is not any more effective at preventing re-offence than restorative justice, and in many ways, the latter is a more difficult procedure for offenders to undertake.⁶⁸ Offenders are expected to take an active role in making reparations to the victim and acknowledging the harm or loss they have suffered.⁶⁹ Indeed,

Punishment works most effectively when carefully measured and accepted by all parties [...] as appropriate. Restorative programmes allow for a more flexible approach to sanctions in order to maximise their relevance for all [...] Their more prevalent adoption may reduce overall punitiveness in favour of more effective reduction in the harm done and reoffending.⁷⁰

A disconnect from legislative norms renders restorative justice very flexible. However, when contrasted with the adversarial system it cannot be deemed unjust simply because the process itself does not fulfil particular formalities. If true justice encompasses reducing an offender's

⁶⁵ Tony Marshall, *Restorative Justice: An Overview* (Report by the Home Office Research Development and Statistics Directorate, 1999).

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Liebmann (n 9).

⁷⁰ Marshall (n 66).

likelihood of recommitting a crime, then restorative justice is arguably more successful, due to its informality, as compared to its evidently formal adversarial counterpart.

Evaluation and Conclusion

It has been said that ‘often the advantages of mediation also contribute to the disadvantages.’⁷¹ As an example, the confidentiality and informality of mediation that many disputants actively pursue also invites criticism for promoting a lack of certainty and a disconnect from public law and scrutiny. There are intrinsic links between several of the criticisms of mediation as well. For instance, a mediator’s lack of impartiality could enhance existing power imbalances if they are seen to lean in favour of the more powerful party. Further, mediation’s lack of checks and balances could reinforce existing power dynamics during the mediation process. The inability to fully separate some of these criticisms from one another likely contributes to why ADR receives a disproportionate amount of disparagement relative to formal legal procedure.

An alternate view is that in trying to decrease the scope for certain faults, mediators will invite others, which is especially relevant to impartiality. Whilst having a bias could exacerbate power imbalances, assuming disputing parties can and should be treated equally could have the same effect. Thus, this author’s view is that a proportional approach should be taken, and mediators should tailor interactions based on existing power dynamics to ‘even the playing field’. For this reason, impartiality is, in this author’s opinion, the least valid criticism explored in this article.

In spite of the critiques put forth here, and others, mediation has on several occasions served as a valuable tool for dispute resolution. Family disputes that lack an unequivocally correct answer,⁷² and the *ad hoc* approach to achieving justice for victims and offenders alike in restorative justice proceedings, are well attuned to facilitated self-determination. This is much easier to accomplish when parties have an element of control over how negotiations proceed. As such, although the criticisms mediation has engendered are indeed remarkable, they are often oppositely applicable to court proceedings with equal credibility.

The coexistence of the adversarial system and ADR is vital to the achievement of personal justice. Those seeking to resolve disputes must conduct a balancing exercise in terms of what values they most wish to uphold, what they hope to gain from conflict resolution, and the shortcomings of the system they choose, as neither is truly without.

⁷¹ Clarke and Davies (n 53).

⁷² [1999] 2 FLR 763.

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